United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1307

UNITED STATES COURT OF APPE
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

JOSE RODRIGUEZ BAEZA,

Appellant.

Docket No. 74-1307

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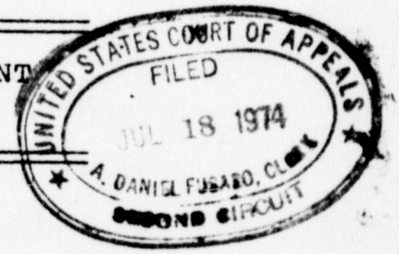
REPLY BRIEF FOR APPELLANT
JOSE RODRIGUEZ BAEZA



ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,	:	
Appellee,	:	
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Appellant.	:	

REPLY BRIEF FOR APPELLANT

In response to appellant's claim of prejudice in failing to sever, the Government primarily argues that appellant participated in the conspiracy after he was fired in October 1969 and therefore that under the Pinkerton theory, evidence relating to events subsequent to the firing, including the Jaguar-heroin smuggling in September 1971, were properly admissible as to him. This argument is without merit.

Although unclear from the Government's brief, it apparently relies on Perez' statement on direct examination that he was introduced to Muzy by appellant and Ortega "by

the end of October" (51) (Government's Brief at 6) to support its contention that appellant participated in the conspiracy two weeks after Ortega announced to Perez that he would have to "separate" appellant and "no longer do business" with him (56-57)*. The Government chooses to reject and ignore Perez' earlier testimony on direct that Muzy's introduction occured prior to appellant's trip to Geneva, Switzerland, on September 25, 1969 (Government's Exhibit 22), and therefore prior to the time appellant was fired (55-56)**.

Accordingly, the Government's reliance on United States v. Gonzales-Carter, 419 F.2d 548 (2d Cir. 1969) and United States v. Agueci, 310 F.2d 817 (2d Cir. 1964) is misplaced. In both cases the defendants continued their involvement without an effective withdrawal from the conspiracy.

The Government similarly places mistaken reliance on United States v. Bynum, 485 F.2d 490 (2d Cir. 1973) and United States v. Calabro, 467 F.2d 973 (2d Cir. 1972) to

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*Perez testified that this conversation occurred in mid-October, 1969 (56).

**Moreover, assuming arguendo appellant's involvement in the conspiracy for a month after his firing, nothing done during this period is remotely connected with the substantive offense involving delivery of heroin in the Jaguar, which occurred in September, 1971, some two years later.

support their claim that the failure to sever did not prejudice the appellant. In each case this Court found the existence of a single chain-type drug conspiracy and thus the acts of a single conspirator in furtherance of the conspiracy were properly imputed to all other members. Here however, as the evidence reflects, and as the Court below ruled, appellant effectively withdrew from the conspiracy in October 1969 and therefore subsequent acts, especially the Jaguar smuggling of 100 kilos of heroin, could not be imputed to appellant.

The Government attempts to distinguish United States v. Falley, 489 F.2d 33 (2d Cir. 1973) on the grounds that the suitcase and hashish improperly admitted against the Falley defendants were also inadmissible against the other defendants there on trial. However in the separate appeal of the co-defendant and alleged co-conspirator, United v. Stoltzenberg, 493 F.2d 53 (2d Cir. 1974) this Court, refusing to follow its decision in United States v. Falley, ruled that the suitcase and hashish were properly admissible as to Stoltzenberg.

United States v. Falley, supra, mandates reversal here. Not only were the two hundred pounds of heroin more emotionally charged than the five pounds of hashish intro-

duced in Falley but here the jury communicated to the Court in a post-verdict letter the difficulties experienced in properly evaluating the testimony as to each defendant. The Government's suggestion, based on United States v. Dioguardi, 493 F.2d 70 (2d Cir. 1974), Miller v. United States, 403 F.2d (2d Cir. 1968) and United States v. Driscoll, 276 F. Supp. 333 (S.D.N.Y. 1967), that defense counsel below acted improperly in speaking to several members of the jury after its discharge is inappropriate. In contrast to Driscoll, supra, here it was one of the jurors who initiated the contact which led to defense counsel's interviews. Moreover, it is clear from the record that the juror who phoned defense counsel was simply acting pursuant to the Court's instructions upon discharge, i.e. that each was free to discuss the case with defense counsel.* Moreover even absent such an instruction counsel's conduct was proper. See United States

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*The Court said: "As far as any discussion now are concerned, at least one thing is true, you can go home and tell your family about the case. As far as any questions that any lawyers may ask of you, you are under no obligation to answer any questions at all about what went on in your deliberations. I suppose as a general matter it is probably a good idea to not rehash it to the lawyers or anybody else very much. But it is really up to you. You are now certainly free to exercise your own judgment. You are under no obligation to answer any questions of anybody, none at all. If you choose to keep your counsel, you are perfectly at liberty to do so. It is really up to you now (3079)."

v. Driscoll, supra; American Bar Association Standards Relating To Trial By Jury, Approved Draft (1971) §5.7 pp. 164-173.

CONCLUSION

For the foregoing reasons and the reasons set forth in appellant's main brief, the conviction should be reversed.

Respectfully submitted,

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